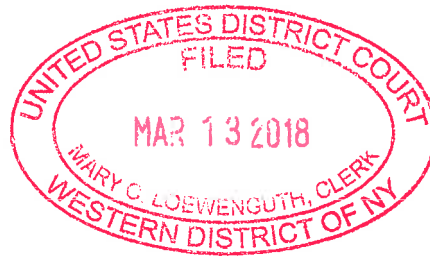


UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK



UNITED STATES OF AMERICA,

DECISION AND ORDER

v.

6:16-CR-06024 EAW

BLAKE RIVERA and VICTOR RIVERA,

Defendants.

Defendants Blake Rivera and Victor Rivera (collectively, “Defendants”) are charged by way of an Indictment filed on March 4, 2016, with conspiracy to possess with intent to distribute, and to distribute, five kilograms or more of cocaine and one hundred grams of heroin, in violation of 21 U.S.C. § 846 (Count One), and possession of firearms in furtherance of the charged drug conspiracy, in violation of 18 U.S.C. §§ 924(c)(1)(A)(i) and (2) (Count Two). (Dkt. 11). All pretrial matters and motions were referred to United States Magistrate Judge Marian W. Payson pursuant to 28 U.S.C. § 636(b)(1)(A)-(B). (Dkt. 12).

Defendants filed various pretrial motions before Judge Payson, including a motion to suppress tangible evidence and identification testimony and a motion to dismiss the indictment on grounds of insufficiency, filed by Defendant Blake Rivera (*see* Dkt. 77; Dkt. 84; Dkt. 85); and a motion to suppress identification testimony and to dismiss the indictment on grounds of insufficiency, filed by Defendant Victor Rivera (*see* Dkt. 62; Dkt. 72; Dkt. 73). On November 21, 2017, Judge Payson issued a thorough Report and

Recommendation recommending that Defendants' motions to suppress and to dismiss be denied. (Dkt. 121).

After granting several extensions of time requested by Defendants (Dkt. 122; Dkt. 123; Dkt. 124; Dkt. 125; Dkt. 126), objections to the Report and Recommendation were filed only by Defendant Victor Rivera, and only with respect to Judge Payson's recommendation that his motion to suppress identification testimony be denied (Dkt. 127). The Government filed a response to the objections on March 1, 2018. (Dkt. 131). At a status conference held on March 2, 2018, the Court requested that the Government provide color copies of the photo arrays at issue in the Report and Recommendation and indicated that the matter would be taken under advisement. (*See* Dkt. 132). That same day, the Government provided the Court with the requested photo arrays.

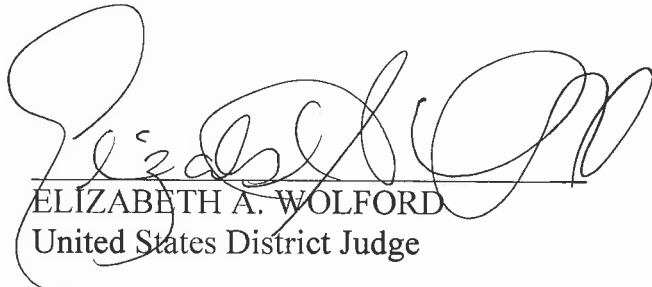
A district court reviews a report and recommendation to which a party has timely objected under a *de novo* standard. Fed. R. Crim. P. 59(b)(3); *see also* 28 U.S.C. § 636(b)(1)(C) ("A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made."); *United States v. Male Juvenile* (95-CR-1074), 121 F.3d 34, 38 (2d Cir. 1997) (requiring a district court to make *de novo* determinations to the extent that a party makes specific objections to a magistrate judge's findings). The Court is not required to review *de novo* those portions of a report and recommendation to which objections were not filed. Fed. R. Crim. P. 59(b)(2) ("Failure to object in accordance with this rule waives a party's right to review."); *see Molefe v. KLM Royal Dutch Airlines*, 602 F. Supp. 2d 485, 487

(S.D.N.Y. 2009) (to trigger the *de novo* review standard, objections to a report “must be specific and clearly aimed at particular findings in the magistrate judge’s proposal”).

Here, Defendant Victor Rivera seeks to suppress the identification testimony, but, as noted by the Report and Recommendation, the challenge is based upon the mistaken factual premise that the confidential source was told by law enforcement that he would be looking at photographs of a father and son. (*See* Dkt. 121 at 6). The record does not support this contention. Moreover, after carefully reviewing the photo arrays, the transcripts of the proceedings before Judge Payson, and the underlying motion papers, this Court agrees with the Report and Recommendation’s conclusion that “nothing about the manner of the procedure, the instructions given, or the array itself was suggestive.” (*Id.* at 7).

In addition, the Court has conducted a careful review of the other issues set forth in the Report and Recommendation to which no objections were filed and finds no reason to reject or modify the Report and Recommendation. Therefore, the Court accepts and adopts the Report and Recommendation in its entirety. (Dkt. 121). For the reasons set forth more fully in the Report and Recommendation, this Court denies Defendants’ pretrial motions to suppress and to dismiss. (Dkt. 62; Dkt. 77).

SO ORDERED.



ELIZABETH A. WOLFORD
United States District Judge

Dated: March 12, 2018
Rochester, New York